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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

VIDEO GAMING TECHNOLOGIES, INC., dba VGT, Inc., a Tennessee Corporation; UNITED CEREBRAL PALSY OF GREATER SACRAMENTO, a California Non-Profit Corporation; WIND Youth Services, a California Non-Profit Corporation; ROBERT FOSS, an individual; JOAN SEBASTIANI, an individual,

Plaintiffs,

v.

BUREAU OF GAMBLING CONTROL, a law enforcement division of the California Department of Justice; MATHEW J. CAMPOY, in his official capacity as the Acting Chief of the Bureau of Gambling Control,

Defendants.

CASE 08 2748

PLAINTIFFS' *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date:
Time:
Dept.:
Judge:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

***EX PARTE* MOTION**

Plaintiffs Video Gaming Technologies, Inc., United Cerebral Palsy of Greater Sacramento, WIND Youth Services, Robert Foss, and Joan Sebastiani (collectively, "plaintiffs"), hereby move this Court for an *ex parte* temporary restraining order and an order to show cause why a preliminary injunction should not issue pursuant to Rule 65 of the Federal Rules of Civil Procedure. Specifically, plaintiffs seek to enjoin and restrain defendants Bureau of Gambling Control and Mathew J. Campoy, in his official capacity as the Acting Chief of the Bureau of Gambling Control (collectively, the "Bureau"), and any other person and/or entity or agency acting in concert or participation with the Bureau (including, but not limited to, the California Attorney General and any other division or bureau of the California Department of Justice), from enforcing various cease-and-desist orders issued by the Bureau on several charitable bingo facilities in Alameda and Sacramento counties in May 2008.

These orders claim that electronic bingo aids manufactured by plaintiff Video Gaming Technologies, Inc. ("VGT") in use at those facilities violate several state statutes relating to lotteries and gaming. In particular, the Bureau bases these orders largely on the Attorney General's unlawful interpretation of the state bingo statute, Penal Code section 326.5, which requires that prizes awarded in a game of bingo be based on a "card." The Attorney General has interpreted the term "card" to prohibit the use of electronic bingo aids that use electronic, as opposed to paper or cardboard, bingo cards. These orders threaten seizure of the electronic bingo aids if they are not removed from their respective locations within 30 days of the respective cease-and-desist order. ***The first of these orders is set to expire this Friday, June 6, 2008.***

This motion is made on the following grounds: (1) VGT's electronic bingo aids comply with the state bingo statute (and the Bureau's unlawful interpretation of it) because they provide paper bingo cards from which a winning pattern can be determined; (2) the Bureau's interpretation of "card" to preclude the use of electronic cards discriminates against disabled individuals in violation of the federal Americans with Disabilities Act; (3) the Bureau's restrictive interpretation of "card" to prohibit electronic cards violates plaintiffs' due process rights; and (4) the other statutes cited in the cease-and-desist orders are facially inapplicable. In addition, the

balance of hardships weighs heavily in favor of plaintiffs because if injunctive relief is not granted to preserve the status quo and allow VGT's electronic bingo aids to remain in operation until a full trial on the merits of plaintiffs' claims, plaintiffs will suffer irreparable harm, including the seizure of private property, a dramatic reduction in the ability of charitable organizations to continue providing charitable services, and the inability of the individual disabled plaintiffs to have equal access to charitable bingo.

This motion is based on this Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Alexander M. Medina, Steve Wilson, Doug Bergman, Robert Eckstrom, Robert Foss, and Joan Sebastiani, all exhibits attached thereto, and on such other evidence and argument as the Court may consider.

Defendants have been notified that this motion would be filed. Plaintiffs will promptly notify defendants of the date, time, and location of the hearing on this motion upon obtaining that information from the Court. (*See* Declaration of Alexander M. Medina, ¶ 7.)

Dated: June 2, 2008

DLA PIPER US LLP

By _____
MATTHEW G. JACOBS
Attorney for Plaintiffs
VIDEO GAMING TECHNOLOGIES, INC., UNITED CEREBRAL PALSY OF GREATER SACRAMENTO, WIND YOUTH SERVICES, ROBERT FOSS, and JOAN SEBASTIANI

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this motion, plaintiffs seek emergency injunctive relief to prevent the California Attorney General, Bureau of Gambling Control (the "Bureau") from seizing private property without justification, discriminating against the disabled, and eviscerating the major funding source for numerous charitable organizations, all on the basis of the Bureau's wrongly constrictive interpretation of a single word in the California bingo statute.

More specifically, in early May 2008, the Bureau served 30-day cease-and-desist orders on several Northern California bingo facilities. The cease-and-desist orders threaten immediate seizure and forfeiture of the bingo facilities' electronic bingo aids. The basis for the orders is the Bureau's claim that the aids violate the California bingo statute because they use electronic cards instead of "traditional" paper or cardboard cards. ***The first of these 30-day deadlines expires this Friday, June 6, 2008.***

The Bureau's threatened action is illegal for a number of reasons. First and foremost, the electronic bingo aids at issue *do* provide paper cards, and thus comply with the California bingo statute and the Bureau's improperly restrictive interpretation of that statute.

Even were that not the case, however, the Bureau's assertion that electronic bingo cards do not qualify as bingo is flatly incorrect. California has only one bingo statute with only one definition of bingo: "a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card that conform to numbers or symbols selected at random. . . ." Pen. Code § 326.5(o) ("Section 326.5"). From that language, "No common meaning of the term bingo emerges." *People v. 8,000 Punchboard Card Devices*, 142 Cal.App.3d 618, 622 (1983). Thus, just as a "writing" refers to both paper and electronic media under California law (*Aguimitang v. California State Lottery*, 234 Cal.App.3d 769, 798 (1991) (a "writing" includes electronic data stored on a computer drive, such as e-mails)), so too does a "card" under Section 326.5 include electronic cards. *See, e.g., Treasure State Games, Inc. v. State of Montana*, 551 P.2d 1008, 1010-11 (Mont. 1976) (rejecting state Attorney General's opinion that electronic bingo cards are illegal

under Montana's bingo law, which defines bingo virtually identically to the California statute).

The Bureau's limitation of bingo to a game played only on paper or cardboard would also cause the California statute to discriminate against disabled people, in conflict with the Americans with Disabilities Act ("ADA"). This is because electronic bingo aids allow disabled people to play bingo on an equal footing with non-disabled people. Disabled people cannot compete with non-disabled people if they are limited to the use of paper cards.

For at least these three reasons, the Bureau's interpretation of the word "card" in the California bingo statute is wrong. If the Bureau is not enjoined from effectuating it, plaintiffs will suffer irreparable harm: the charitable organization plaintiffs will suffer a severe drop-off in revenue and a resulting decrease in their ability to provide critical social services; plaintiff Video Gaming Technologies, Inc. ("VGT"), which manufactures the bingo aids in question, will suffer a dramatic loss of income and the seizure of its property; and the individual disabled plaintiffs will suffer discriminatory treatment under law, losing their freedom to engage in this form of entertainment on an equal footing with their non-disabled peers. Plaintiffs' monetary losses cannot later be recovered from the Bureau or the Attorney General.

By contrast, preserving the status quo will not harm the Bureau. No imminent harm will befall the Bureau or the citizens of California if the Bureau is not permitted to effectuate its interpretation of Section 326.5 immediately. In short, since the balance of hardships weighs heavily on plaintiffs' side, the Court should enjoin the Bureau from effectuating its restrictive interpretation of the California bingo statute pending a full trial on the merits of this action.

II. FACTUAL BACKGROUND

A. The Cease-and-Desist Orders

In early May 2008, the Bureau personally served cease-and-desist notices on charitable bingo facilities in Alameda and Sacramento Counties informing them that Bureau agents had inspected electronic bingo "devices" at each facility and concluded that those devices violated

several statutes. (Declaration of Alexander M. Medina ("Medina Decl."), ¶ 2, Ex. A ("Orders").)[1] Specifically, the Orders identified the make and model of what it termed "gaming devices" and claimed that those devices violated Penal Code sections 318 (prevailing upon a person to visit a place for gambling), 321 (illegal sale of lottery tickets), 326.5 (unlawful bingo devices), and 330b (illegal slot machines). (*Id.*) The Bureau further stated that unless the identified devices were removed within 30 days of each Order,[2] the Bureau would pursue further enforcement action, including possible criminal prosecution and seizure of the devices and related proceeds under Penal Code sections 325 and 330a. (*Id.*) The Orders were signed by defendant Mathew J. Campoy, the acting chief of the Bureau.

These bingo facilities allow qualified charitable organizations, such as plaintiffs WIND Youth Services ("WIND") and United Cerebral Palsy of Greater Sacramento ("UCP") to raise critical funds by hosting bingo fundraiser events using electronic bingo aids. (Declaration of Steve Wilson ("Wilson Decl."), ¶ 2.) Charities then in turn use funds obtained from the bingo events to fund their programs. (*Id.*; Declaration of Doug Bergman ("Bergman Decl."), ¶ 3; Declaration of Robert Eckstrom ("Eckstrom Decl."), ¶ 3.)

B. The California Bingo Law

The California Constitution provides that "the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes." Cal. Const. art. IV, § 19(c). Pursuant to this authority, the Legislature enacted Section 326.5 in 1976. It codifies the Constitution's grant of authority to allow cities and counties to enact ordinances allowing charitable bingo. Both Sacramento and Alameda Counties have enacted ordinances allowing for the play of bingo pursuant to Section 326.5. Sacramento County Code §§ 4.26 *et seq.*, 4.29 *et seq.*; Alameda County General Ordinance Code §§ 3.12.010, 3.12.020.

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[1] The facilities at issue are Gilman Street Bingo in Berkeley (served May 12, 2008), the Sacramento Bingo Center in Sacramento (served May 7, 2008), the Mayhew Community Bingo Center in Sacramento (served May 8, 2008), the North Watt Bingo Parlor in Sacramento (served May 8, 2008), and the Madison Mall Bingo Center in Sacramento (served May 8, 2008).

[2] Because the first Order was served on May 7, 2008, the 30-day period expires this Friday, June 6, 2008.

Section 326.5 does not include a comprehensive definition of bingo, and is not designed to do so. Rather, it defines bingo as "a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card that conform to numbers or symbols selected at random. . . " (Pen. Code § 326.5(o)), and relies on the counties to determine whether to enact ordinances to describe and allow charity bingo.[3] There are no reported cases, state or federal, interpreting the definition of "card" in Section 326.5(o). Neither is there any definitive interpretation of the term "bingo." *8,000 Punchboard Card Devices* 142 Cal.App.3d at 622 ("No common meaning of the term bingo emerges."). Plaintiffs do not seek a comprehensive interpretation of the bingo laws from this Court. Rather, the relief requested is simply to protect plaintiffs from the Bureau's specific, unlawful interpretation that is actually at issue in this case.

C. The Plaintiffs in This Case[4]

VGT manufactures electronic bingo aids for use in charitable bingo games in Northern California. (Wilson Decl., ¶ 2.) As stated in greater detail below, VGT manufactured and supplied the vast majority of the electronic bingo aids identified in the Orders. (*Id.*, ¶ 3.)

UCP is a 501(c)(3) charity whose mission is to provide programs and services that improve the independence, productivity, and quality of life of people with cerebral palsy and other developmental disabilities and their families. (Bergman Decl., ¶ 2.) UCP was founded in 1955 and now runs 13 different programs that serve more than 1,400 individual clients. (*Id.*) UCP derives substantial and important revenues from regular bingo fundraisers that it holds at bingo facilities in the Sacramento area. (*Id.*, ¶ 3.) One of UCP's important programs is "Saddle Pals," which is a therapeutic horsemanship program that provides services to individuals with physical or developmental disabilities. (*Id.*, ¶ 8.) The program began in 1993 and is accredited through the North American Riding for the Handicapped Association. (*Id.*) Saddle Pals relies almost exclusively on funding from UCP's bingo fundraisers. (*Id.*)

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[3] The remainder of Section 326.5(o) identifies the necessary characteristics of a related form of bingo, "punchboards," which are not at issue here.

[4] *See* Complaint, ¶¶ 49-50 for further standing allegations.

WIND is a 501(c)(3) corporation that serves the immediate and long-range needs of homeless youth in Sacramento County. (Eckstrom Decl., ¶ 2.) WIND relies on revenue obtained from regular bingo fundraisers played exclusively with VGT's electronic bingo aids in order to fund its numerous programs. (*Id.*, ¶ 3.)

Robert Foss is a 68-year-old Sacramento resident who has been legally blind since 2002. (Declaration of Robert Foss ("Foss Decl."), ¶ 2.) For approximately three years, Mr. Foss has been active with the Society for the Blind ("SFB"), first being trained in non-sighted living skills, then training and mentoring other blind people himself. (*Id.*, ¶ 3.) For at least one year, Mr. Foss has been volunteering at least four days a week to help SFB run its charitable bingo games at the Sacramento Bingo Center and to host guests who come to play. (*Id.*, ¶ 4.) Mr. Foss also enjoys competing in bingo games on VGT electronic bingo aids, and has encountered other blind people doing the same. (*Id.*, ¶ 5.) These electronic bingo aids allow him and other blind and low-vision individuals to effectively compete at bingo with sighted individuals. (*Id.*, ¶ 6.) He is unable to compete equally with sighted individuals by using only paper bingo cards, and is even at a disadvantage with Braille bingo cards or other cards with raised numbers or other tactile-functions, since he is not able to locate squares with called numbers or identify winning bingo patterns quickly enough to win. (*Id.*, ¶ 8.)

Joan Sebastiani is a 65-year-old Sacramento resident who has been completely paralyzed on the left side of her body since suffering a stroke in 1994. (Declaration of Joan Sebastiani ("Sebastiani Decl."), ¶¶ 1-2.) She lives in an assisted living facility, and uses a wheelchair to get around. (*Id.*, ¶ 2.) Ever since the Sacramento Bingo Center opened in approximately May 2007, Ms. Sebastiani has been attending bingo there about four or five times a month, for a few hours at a time. (*Id.*, ¶ 3.) She is only able to play bingo using electronic bingo aids. (*Id.*, ¶ 5.) She cannot play bingo using only paper cards, due to her disability, because she cannot manipulate, locate, or daub squares with called numbers, or identify winning bingo patterns and call them out quickly enough to win in an "all paper" bingo game. (*Id.*) The electronic bingo aids allow her to compete in bingo games against able-bodied individuals. (*Id.*)

D. VGT's Electronic Bingo Aids

The Orders identify a total of 303 electronic bingo aids that the Bureau contends are unlawful. Of these 303, 286 were manufactured by VGT and provided to the respective locations for their use in charitable bingo games. (Wilson Decl., ¶ 3.) Until recently, VGT's electronic bingo aids operated as follows: A player pays the clerk (a member of a charitable organization volunteering his or her time) a certain amount of money for the purchase of electronic bingo cards to be played on an electronic bingo aid. (*Id.*, ¶ 5.) The clerk gives the player a receipt with a code on it. (*Id.*) The player inserts that code into an electronic bingo aid, which then recognizes the code and gives the player a certain amount of credits for the purchase of electronic bingo cards on that particular bingo aid. (*Id.*) A player may play only one card per game. (*Id.*) The clerk may assist a blind or otherwise disabled person who cannot input the code. (*Id.*)

The electronic cards contain columns and rows with numbers. All players must obtain their bingo cards before a game starts. (*Id.*, ¶ 6.) Each of the electronic bingo aids link into a common game, which cannot begin until at least two players are present. (*Id.*, ¶ 7.) Once the game begins, a centralized common random number generator draws the numbers, which are in turn displayed on the screen of each electronic bingo aid in real time and in the sequence drawn (*i.e.*, the winning pattern is not known before a game begins). (*Id.*) After this initial draw, the player must then "daub" (or cover) the matching numbers on the electronic cards by pressing a button on the bingo aid. (*Id.*, ¶ 8.) If a player does not press the daub button, then he or she "sleeps" those numbers such that they are not counted toward a winning pattern for that player. (*Id.*) Once a player obtains a winning pattern, he or she must be the first person in the game to press his or her button to "call" bingo. (*Id.*) If a player has a winning pattern but does not press the button, then he or she "sleeps" the win and another player with a winning pattern can subsequently call bingo and win. (*Id.*)

Neither the charitable organization nor any other entity has any interest in the outcome of the game, and there must always be a winner for every game. (*Id.*, ¶ 9.) As such, the game continues and numbers continued to be called until there is a winner. (*Id.*) Additionally, the player has the option of printing a paper copy of each bingo card used in a particular game. (*Id.*,

¶ 10.) Whether the player has won or not can be determined on the basis of the paper alone. (*Id.*)

On May 28, 2008, or about three weeks after the first of the Orders was served, VGT began changing the software on all of its electronic bingo aids operating in Alameda and Sacramento Counties, in an effort to ensure that the electronic bingo aids comply with even the Bureau's restrictive interpretation of Section 326.5. (*Id.*, ¶ 11.) This new software ensures that paper cards are an integral and necessary component of the game in that they are purchased and received by a player prior to playing bingo with a VGT electronic bingo aid. (*Id.*, ¶ 12.) Each electronic bingo aid is programmed with only one electronic card. (*Id.*, ¶ 12.) When a player chooses to play at a particular electronic bingo aid, he or she will be given a booklet containing the entire library of corresponding paper cards with matching reference numbers so that the player can locate the paper card corresponding to the electronic bingo aid. (*Id.*) If the player decides that he or she wishes to use a different card, then he or she must move to a different bingo aid. (*Id.*) The player can verify whether he or she has won based solely on the paper card. (*Id.*; *see also* Ex. A (sample paper bingo cards).) In all other respects, the new version of VGT's electronic bingo aids operate the same way the earlier versions did. (*Id.*, ¶ 12.)

E. <u>The Bureau's Interpretation of Section 326.5 and Its Refusal to Withdraw the Orders</u>

The Orders are based on the Attorney General's specific, unlawful interpretation of the term "card" in Section 326.5(o) as being limited to cards made of paper or cardboard and prohibiting VGT's electronic bingo aids. More specifically, in August 2007, the Attorney General issued a "Law Enforcement Advisory" addressing the issue of bingo played with electronic aids. (Medina Decl., ¶ 3, Ex. B ("Aug. 10, 2007 Advisory").) In that advisory, the Attorney General concluded, in reliance on his own 1987 and 1998 opinions, that any form of bingo not played with "traditional bingo cards," *i.e.*, those made of paper or cardboard, is unlawful. (*Id.*, pp. 1-3.)[5] The Advisory did find, however, that electronic bingo aids comply with Section 326.5 so long as traditional bingo cards are used as well. (August 10, 2007 Advisory,

[5] These opinions have no precedential value. *See, e.g.*, *In re Quinn* 35 Cal. App. 3d 473 (1973), 482 ("Opinions of the Attorney General are not binding on this court.").

p. 3.)

Even though VGT believes that its original electronic bingo aids complied with Section 326.5, after receiving the Orders, VGT worked to convince the Bureau to "stand down" from enforcing the Orders against VGT's bingo aids. Most significantly, VGT made the software changes to its electronic bingo aids described above in an effort to ensure that they would comply with even the strictest interpretation of the term "card." (Wilson Decl., ¶ 11.) Those changes were expensive, as VGT had to develop, test, and install new software for each of its electronic bingo aids in Sacramento and Alameda Counties to conform to the Bureau's interpretation of the statute. (*Id.*, ¶ 13.)

VGT has also met and corresponded with the Bureau and the Attorney General on several occasions to inform them of the changes to VGT's electronic bingo aids in an attempt to demonstrate that those aids comply with the Bureau's (unlawful) interpretation of Section 326.5. (Declaration of Harlan Goodson ("Goodson Decl."), ¶¶ 6-10.) Despite these efforts, the Bureau has refused to withdraw the Orders, and has threatened to seize the machines as early as this coming Friday based solely on a visual assessment of the electronic bingo aids at each bingo facility, even though the changes to those aids are largely technical in nature. (*Id.*, ¶ 10.) Plaintiffs thus fear that the Bureau lacks the technical expertise to adequately evaluate the newly-configured electronic bingo aids and that it will seize the aids and shut down the bingo facilities solely on the basis of the aids' appearance. (*Id.* ¶ 11.)

III.
ARGUMENT

Plaintiffs seek to enjoin the Bureau from enforcing the Orders on three grounds: (1) VGT's electronic bingo aids comply with Section 326.5(o) because they provide paper bingo cards from which a winning pattern can be determined; (2) the Bureau's interpretation of "card" to preclude the use of electronic cards discriminates against disabled individuals in violation of the ADA; and (3) the Bureau's restrictive interpretation of "card" to preclude the use of electronic cards violates plaintiffs' due process rights. In addition, the other statutes the Bureau cites in its Orders as a basis for seizing VGT's aids are facially inapplicable.

A. **Legal Standards for Injunctive Relief**

The purpose of temporary injunctive relief is to preserve the status quo until a court determines the underlying action on its merits. *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1998). To support the issuance of a preliminary injunction, plaintiffs must demonstrate either: "(1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." *The Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 507 (9th Cir. 1988)). These are not distinct legal standards, but rather represent two points on a continuum. *State of Cal. v. Am. Stores Co.*, 872 F.2d 837, 840-41 (9th Cir. 1989) (rev'd on other grounds, 495 U.S. 271 (1990)). Where the balance of hardship decidedly favors the plaintiff, a lesser showing of likelihood of success on the merits is required; where the probability of success on the merits is high, only the possibility of irreparable injury need be shown. *Id.* A case involving issues of public interest also requires a court to consider whether the public interest favors the plaintiff. *Id.*

B. **Plaintiffs Are Likely to Prevail on Their Claim That VGT's Electronic Bingo Aids Comply With Even the Bureau's Unlawful Interpretation of Section 326.5 Because They Provide Paper Cards.**

Simply stated, the Orders should not be enforced against VGT's electronic bingo aids because they comply with the plain language of Section 326.5 *and* even with the Bureau's unlawful and restrictive interpretation of that statute. Section 326.5(o) does not require that bingo actually be *played* on a card, but rather requires that "prizes [be] awarded on the basis of designated numbers or symbols on a card that conform to numbers or symbols selected at random." In other words, even if "card" means paper or cardboard only, the game must merely allow the player to verify a winning pattern on a paper or cardboard card to comply with the statute.

As shown above, both the old and new versions of VGT's electronic bingo aids satisfy this requirement. Before VGT's recent software change, players had the option of printing a paper copy of that player's cards for a particular game. (Wilson Decl., ¶ 10.) Each player could determine whether he or she had won or lost from that paper alone. (*Id.*) The current software

provides papers cards to each player in advance. (*Id.*, ¶ 12.) Thus under both the old and new versions of VGT's electronic bingo aids, a winning card may be verified from the paper cards alone, and, consistent with Section 326.5(o), prizes are awarded "*on the basis* of designated numbers or symbols on a card that conform to numbers or symbols selected at random." Pen. Code § 326.5(o) (emphasis added).

Hence even under the most restrictive interpretation of the term "card," plaintiffs have demonstrated a likelihood that they will prevail on their claim that VGT's electronic bingo aids comply with Section 326.5.

C. Plaintiffs Are Likely to Prevail on Their Claim That the Bureau's Interpretation of Section 326.5 Violates Federal Law Because It Discriminates Against Disabled Individuals.

Separate and independent of their claim that the bingo aids in question actually comply with the Bureau's restrictive reading of the California bingo statute, plaintiffs are likely to prevail on their claim that that specific interpretation violates the ADA.

1. Overview of ADA

Congress passed the ADA to "bring individuals with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 1st Sess., at 58 (1989). Title II of the ADA, 42 U.S.C. §§ 12131-65, prohibits discrimination on the basis of disability by public entities, including in the enactment and enforcement of state laws.[6] ADA § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (2008). Section 12132 thus constitutes a general prohibition against discrimination by public entities. This prohibition does not allow public entities to enact

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[6] Title II of the ADA incorporates the enforcement provisions of the Rehabilitation Act, and case law construing the Rehabilitation Act provides guidance in construing the ADA. *In re Anthony P.*, 84 Cal. App. 4th 1112, 1116.(2000); *Black v. Dept. of Mental Health*, 83 Cal. App. 4th 739, 749 (2000).

discriminatory statutes, or to interpret and enforce them in a discriminatory manner (*see Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1986)), subject to the provisions of Title II of the ADA. This protection of the disabled applies regardless of the subject matter of the statute. *See id.* at 1483-84.

Federal courts have consistently held that the proscriptions of Title II of the ADA apply to laws and ordinances enacted by state and local governments. For example, in *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32 (9th Cir. 1999), the Ninth Circuit found that Title II of the ADA prohibits discrimination against disabled individuals in city zoning ordinances, even though zoning "is a traditionally local activity." *Id.* at 732 (citations omitted). Further, in *South Dakota Farm Bureau v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002), the Court cited the federal regulations and found that:

> Title II applies to anything a public entity does. Title II coverage, however, is not limited to "executive" agencies, but includes activities of the legislative and judicial branches of State and local governments.

Id. at 1041. Therefore, any law enacted by the California Legislature (and any interpretation of that law) enforced by the Attorney General must comply with the ADA, even if the law governs an area traditionally under state control.

In enacting § 12132 of the ADA, Congress intended to prohibit both outright discrimination and insidious discrimination that denies disabled persons services disproportionately due to their disability. *Crowder*, 81 F.3d at 1483. In other words, Congress intended to prohibit "disparate impact" instances of discrimination by "facially neutral" laws. *Id.* In *Crowder*, the Ninth Circuit considered Hawaii's "facially neutral" law requiring a 120-day quarantine for all dogs entering the state. *Id.* Even though the law was enacted to protect the health and safety of the State's residents and animals, the Court found that the manner of enforcement of that law "burden[ed] visually-impaired persons in a manner different and greater than it burden[ed] others. . . . The quarantine, therefore, discriminate[d] against the plaintiffs by reason of their disability." *Id.* at 1484.

2. As Written and Enforced Section 326.5 Must Comply With the ADA.

Any state law or constitutional provision that conflicts with federal law is preempted under the federal Constitution's Supremacy Clause. U.S. Const. Art. VI, cl. 2; *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way."); *South Dakota Farm Bureau*, 202 F. Supp. 2d at 1042. As such, statutes must be construed to preserve their constitutionality, whenever feasible, within the bounds set by their words and purpose. *San Francisco Unified Sch. Dist. v. Johnson,* 129 Cal. 3d 937, 942 (1971); 58 Cal. Jur. 3d, Statutes sec. 111 (2004), and cases cited therein. "The beginning premise of any determination regarding the constitutionality of a statute is an assumption of its validity, and where two alternative statutory interpretations are presented, one unconstitutional and the other constitutional, the court will choose the construction that upholds the validity of the statute." *Id.*

This guiding rule of interpretation is, of course, binding on the Attorney General just as it is binding on the Courts. Here, the Attorney General has violated that principle by seeking to enforce an interpretation of Section 326.5 that would discriminate against disabled individuals, claiming that only paper or cardboard cards are allowed under that statute.

Just one reason why the Bureau's interpretation is wrong is that it would burden disabled individuals in a manner differently and greater than it would burden non-disabled persons, thus violating the ADA. More specifically, under the Bureau's interpretation, disabled individuals, such as plaintiffs Mr. Foss and Ms. Sebastiani, will be denied equal access to charitable bingo while non-disabled players will be able to continue playing as before. (Foss Decl., ¶¶ 7-8; Sebastiani Decl., ¶ 7.) Paper or cardboard bingo cards do not allow these plaintiffs the same "meaningful access" to charitable bingo afforded to non-disabled Californians. (*Id.*) This is because their disabilities make it difficult, if not impossible, to manually daub paper bingo cards. (*Id.*) And even if these plaintiffs could manually daub, they could not do so on the appropriate spots on multiple paper bingo cards as quickly as their non-disabled counterparts, placing them at a distinct disadvantage. (*Id.*) In other words, manual, paper bingo simply is not an option for them. (*Id.*)

On the other hand, VGT's electronic bingo aids allow equal access to charitable bingo for the disabled and non-disabled alike. The ability to daub one's card with the push of a button places the disabled person on equal footing with all players, whether games are played with multiple cards as they were with the old version of VGT's software, or with one card under the new software. (Foss Decl., ¶ 5; Sebastiani Decl., ¶ 5.) The Bureau's interpretation of Section 326.5 would thus violate the ADA through the disparate impact it would have on disabled bingo players, rendering the statute unconstitutional. *See Crowder*, 81 F.3d at 1483-84. The Bureau's interpretation must therefore be rejected and prohibited.

By contrast, plaintiffs' interpretation of Section 326.5 would allow the statute to peacefully coexist and comply with the ADA and, therefore, the Supremacy Clause. This is just one more reason why plaintiffs' interpretation that "bingo card" includes electronic cards is correct, and why plaintiffs are likely to prevail on their claims.

D. Plaintiffs Are Likely to Prevail on Their Claim That the Bureau's Interpretation of "Card" to Preclude Electronic Cards Violates Plaintiffs' Due Process Rights.

The Fifth and Fourteenth Amendments to the United State Constitution, as well as Article I, section 7 of the California Constitution, preclude any person from being deprived of "life, liberty, or property, without due process of law." Yet the Bureau is poised to abrogate those rights based solely on its unilateral interpretation of the term "card" by seizing VGT's bingo aids and shutting down California charitable bingo facilities without a trial to determine whether the bingo aids are the types of devices that the Bureau may seize in the first place. (*See* Orders (citing Penal Code §§ 325 and 335a as grounds for seizure, which, facially, allow for the seizure of illegal lottery devices or slot machines without a final judgment).)

The Bureau's interpretation of "card" is erroneous. Section 326.5(o) merely states that bingo is played on a "card." California law contains no further definition of that term, either by statute or reported case.

In fact, in a remarkably similar context, a California court rejected the government's argument that the term "bingo" in the California bingo statute was restricted to the "traditional" form of that game. In *8,000 Punchboard Card Devices, supra*, the Alameda County District

Attorney argued that the amendment to Section 326.5 allowing "punchboard" bingo was unconstitutional because the electorate intended, in amending the California Constitution, that the definition of the term "bingo" should be "traditionally understood," which, according to the District Attorney, involves only "drawing numbers at random and covering spaces on a card." 142 Cal. App. 3d at 621.

The court disagreed, holding that no such limitation could be read into the Constitution because the term "bingo" is "doubtful or obscure," and "capable of several interpretations." *Id.* at 620-21. The court thus rejected the notion of a "traditional" definition of bingo because it found that term to include any number of different but related games played in a variety of formats (such as raffles, spinning wheels, and even dominoes). *Id.* at 620-621, 622. The court ultimately concluded, "No common meaning of the term bingo emerges." *Id.* at 622.

The inquiry is thus not "traditional" versus "non-traditional" bingo, but whether the game itself complies with the relevant statutes. *See Bell Gardens Bicycle Club v. Cal. Dept. of Justice*, 36 Cal. App. 4th 717, 744 (1995) (citing *Cal. Gas. Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 859 (1958)). As shown above, VGT's electronic bingo aids are just bingo games played on a computer screen. The nature of the electronically-aided game is identical to a game played with paper cards, such as the element of competition among multiple players, randomly-selected numbers that correspond to pre-determined patterns on the electronic cards, and the requirement that the house never wins. (*See* Section II(D), *supra*.)

In short, the specific media on which the game is played is of no import. We are long past the day of distinguishing between tangible, "hard" media and its "softer" counterparts for legal purposes. Just as the term "writing," traditionally understood to refer to paper only, now includes both paper and electronic media under California law (Evid. Code § 250; *see also Aguimitang v. California State Lottery*, 234 Cal. App. 3d 769, 798 (1991) (a "writing" includes electronic data stored on a computer drive, such as e-mails)), so too does "card" include both paper and electronic formats.

Although there are no reported California cases on point, other courts have adopted a similar view of electronic bingo cards. In *St. Mary's Catholic Church, et al. v. City of National*

City, San Diego County Superior Court Case No. 563569 (Sept. 9, 1986), the court issued a Statement of Decision after a court trial, holding that the plaintiff's electronic bingo device constituted a "card" within the meaning of Section 326.5. (Medina Decl., ¶ 4, Ex. C ("Statement of Decision"), p.2.)[7] More specifically, the court found that the devices at issue, which used electronic representations of bingo cards, "result[] in the playing of bingo as intended by the body of law authorizing this game in California." (*Id.*, pp. 2-3.); *see also Treasure State Games, Inc. v. State of Montana*, 551 P.2d 1008, 1010-11 (Mont. 1976) (rejecting state Attorney General's opinion that electronic bingo cards are illegal under Montana's bingo law, which defines bingo virtually identically as the California statute); *State v. Pinball Machines*, 404 P.2d 923, 924 (Alaska 1965), *passim* (referring to an electronic representation of a bingo card on a pinball machine as a "bingo card" throughout).

Moreover, there exists a large body of law relating to the interpretation of bingo under the federal Indian Gaming Regulatory Act ("IGRA"). Specifically, bingo is classified as a "Class II" game under IGRA (as opposed to a Class III game, such as a slot machine), with electronic cards explicitly permitted. 25 U.S.C. § 2703(7)(A)(i)(I)-(III).[8] So long as an electronic bingo aid

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[7] Plaintiffs request that the Court take judicial notice of the Statement of Decision, which is attached as Exhibit C to the Medina Decl., pursuant to Rule 201 of the Federal Rules of Evidence.

[8] Section 2703(7)(A) provides, in pertinent part:
The term "class II gaming" means—

> (i) the game of chance commonly known as bingo (*whether or not electronic, computer, or other technologic aids are used in connection therewith*)--
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn *or electronically determined*, and
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . . .

(emphasis added).

requires at least two players and players play against each other, not the house, that device is a permissible Class II game under IGRA, not an impermissible "electronic facsimile" of a game of chance. 25 U.S.C. § 2703(7)(A)(ii); *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1099-1101 (9th Cir. 2000).[9]

Furthermore, in direct contravention to its current position, the California Attorney General has previously opined that games played with electronic representations of cards are equivalent to playing the games with physical cards. More specifically, the Attorney General was asked in 1983 to analyze whether a video poker machine was an illegal slot machine. (Medina Decl., ¶ 5, Ex. D ("Sep. 15, 1983 Attorney General Opinion").) Poker is defined as a "controlled game . . . played with cards." Pen. Code § 337j(e)(1). Similar to Section 326.5(o), the term "card" is not defined in the Section 337j(e)(1). Although the Attorney General concluded that the video poker machine at issue was not a slot machine, he nonetheless found that the game being played on the machine was properly considered poker *even though the machine used only electronic representations of cards, not actual playing cards*. (*Id.*, pp. 7-8.)

In so finding, the Attorney General adopted the reasoning of *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 435 N.E.2d 407 (Ohio 1982), and *Treasure State Games*, *supra*, with the former holding that since poker is a game of chance under the Ohio statute, poker played on a machine is also a game of chance, and the latter holding that electronic bingo is equivalent to non-electronic bingo. (*Id.*, p. 5, and citing *Mills-Jennings*, 435 N.E.2d at 408 ("Whether the game being played is on a video screen or on a card table makes no real difference.") and *Treasure State Games*, 551 P.2d at 1008.)

In short, numerous courts, the California Legislature, the United States Congress, and even the California Attorney General, all believe that an electronic representation of a tangible item is equivalent to the item itself. Plaintiffs have thus shown a likelihood of success on the

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[9] It is notable that, in refusing to withdraw the Orders, defendant Campoy instructed VGT to refer to the Class II standards to determine how to ensure that its electronic bingo aids will not be found unlawful. (*See* Goodson Decl., ¶ 5.) Those standards, as just shown, support plaintiffs' position.

merits of their claim that defendants must be enjoined from enforcing an interpretation of Section 326.5 that prohibits electronic bingo cards.

E. Plaintiffs Are Likely to Prevail on Their Claim That the Remaining Statutes in the Orders Are Inapplicable.

In addition to threatening seizure under Section 326.5, the Orders also threaten seizure under Penal Code section 330b ("Section 330b"). Section 330b essentially prohibits the possession or use of slot machines in California, with some exceptions for tribal gaming activities. But the two sections are mutually exclusive such that if a game or device is determined to fall within the statutes governing lotteries under Title 9, Chapter 9 of the Penal Code (of which Section 326.5 is a part), then the statutes governing gaming under Title 9, Chapter 10 (of which Section 330b is a part) are inapplicable. *Trinkle v. California State Lottery*, 105 Cal. App. 4th 1401, 1406 (2003) ("California law has long distinguished between lotteries and other forms of illegal gambling, treating gaming, betting, and lotteries as 'separate and distinct things in law and fact. . . .' [¶] While some. . . games resemble some forms of lottery, these two categories of gambling [gaming and lotteries] are *mutually exclusive* of one another. . . .") (quoting *Western Telecon, Inc. v. California State Lottery*, 13 Cal. 4th 475, 484 (1996) (emphasis in original, other quotations omitted)).

In other words, if the electronic bingo aids are not prohibited by Section 326.5, then they are a lawful version of a lottery and cannot, by definition, be slot machines. As shown above, plaintiffs have demonstrated a likelihood of success on their claim that the electronic bingo aids are not prohibited by Section 326.5. By extension, the Bureau should be precluded from enforcing the Orders under Section 330b.[10]

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[10] Moreover, the electronic bingo aids are not slot machines because a slot machine, by definition, allows the house to win with no competition among other players. *See* Pen. Code § 330b; *Trinkle*, 105 Cal. App. 4th at 1406-1407, 1410-1411; *Western Telecon, Inc. v. Cal. State Lottery*, 13 Cal. 4th 475, 484-85 (1996). With electronic bingo aids, on the other hand, competition is the name of the game, as games cannot be played without at least two players, one of whom *must* win. Because the electronic bingo aids are not slot machines, the Bureau cannot enforce the Orders against them on the basis that they are. Indeed, even defendant Campoy, the Acting Chief of the Bureau (and the one who signed the Orders), apparently believes that "the

The remaining two statutes identified in the Orders do not apply here either. Those statutes, Penal Code sections 318 and 321, are tied to a finding that the electronic bingo aids are illegal gambling devices. For instance, Section 318 makes it a misdemeanor if one "prevails upon any person" to visit a place "kept for the purpose of illegal gambling." But if there is no illegal gambling at a particular location, then the statute is inapplicable on its face. That is the case here, as the electronic bingo aids comply with Section 326.5 and are not slot machines.

Similarly, Section 321 prohibits the sale of lottery tickets. As charitable bingo is an exception to the general prohibition on lotteries under Title 9, Chapter 9 of the Penal Code, the Bureau's theory is apparently that if the electronic bingo aids do not comply with Section 326.5, then they are instruments of an illegal lottery. But, as shown above, the bingo aids are compliant with Section 326.5 and thus do not constitute lottery devices.

In short, neither Section 330b, 318 or 321 permits the unconstitutional seizure threatened in the Orders.

F. <u>In Addition to the Likelihood of Prevailing on Their Claims, The Balance of Hardships Weighs Heavily in Favor of Granting This Motion.</u>

Plaintiffs have established above that they are likely to prevail on their claims at trial, the first factor in determining whether their motion for an injunction should be granted. The second factor – the balance of hardships – weighs at least as strongly in favor of plaintiffs, since the Bureau's threatened enforcement action will devastate plaintiffs' property and liberty interests immediately (with no possibility of compensation later), while maintaining the status quo harms the Bureau not at all.

1. Plaintiffs Face the Imminent Risk of Irreparable Injury for Which They Have No Adequate Remedy at Law.

The Bureau has stated unambiguously that as soon as this Friday, June 6, 2008, it will "pursue such enforcement action as may be necessary, including but not limited to, seizing the unlawful gambling devices and associated unlawful proceeds and criminal prosecution of the

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machines used by bingo parlors are not slots. . . ." (Medina Decl., ¶ 6, Ex. E (Contra Costa Times article quoting Mr. Campoy).)

offender." (Orders.) Were that to occur, the charitable organization plaintiffs would suffer a severe reduction in revenue and a resulting decrease in their ability to deliver social services; VGT would suffer a dramatic loss of income and the seizure of its property without due process; and the individual disabled plaintiffs would lose their freedom to engage in this form of entertainment on an equal footing with their non-disabled peers. Although VGT recently replaced the software on its electronic bingo aids to ensure that they comply with even the strictest interpretation of Section 326.5(o), the Bureau has not withdrawn its Orders, and thus the threat of seizure continues.

As for WIND and UCP, their inability to host bingo fundraisers, even for a short time, would substantially reduce their revenue. (Eckstrom Decl. ¶ 6; Bergman Decl., ¶ 8.) This is likely to cause them to have to slash or eliminate their charitable programs, which deliver scarce social services to their very needy constituencies. (*Id.*) The loss of revenue to UCP could even lead to its closure. (Bergman Decl., ¶ 8.)

VGT would also lose significant revenue from the sale of bingo cards to the charities and the possible seizure and destruction of its equipment. (Wilson Decl., ¶ 17.) Like the charities' loss of revenue from charitable bingo, this harm to VGT is also irreparable because it would not be recoverable through damage awards against the Bureau later.

In addition, if disabled individuals cannot use electronic bingo aids, they cannot play charitable bingo competitively. Many disabled individuals, including Mr. Foss and Ms. Sebastiani, greatly enjoy the activity of charitable bingo and intend to continue playing so long as the tools needed for them to compete – electronic bingo aids — remain available to them. Mr. Foss would suffer significant harm and embarrassment if he could no longer participate in the very bingo games that he dedicates so much volunteer effort to facilitate. Ms. Sebastiani would lose her *only* social outlet. (Foss Decl., ¶ 11; Sebastiani Decl., ¶ 4.)

Denying disabled persons the ability to engage in this form of entertainment cannot be remedied at law. Indeed, it is not only the possibility of winning money that prompts people, both able-bodied and disabled, to play bingo. People, regardless of disability, also play bingo for the satisfaction and social interaction they receive from simply playing the game. (*See id.*)

2. The Bureau Will Suffer No Hardship From Maintaining The Status Quo.

By contrast to the dramatic injuries the Bureau's enforcement of its Orders would visit on plaintiffs, the Bureau would suffer no harm from the continuation of the status quo. Neither the Bureau nor any other government agency has previously commenced any enforcement action against VGT's electronic bingo aids. (Wilson Decl., ¶ 4.) As such, plaintiffs are merely asking the Court to temporarily require the Bureau to do what it has been doing all along – nothing – until the Court can determine whether the Bureau would be legally justified in shutting down charitable bingo in Northern California. Even if the Court ultimately decides that the Bureau may proceed with its enforcement actions, the intervening delay would have no tangible impact on the Bureau. The balance of harms weighs heavily in favor of the issuance of a temporary restraining order.

3. The Public Interest Favors Issuance of a Temporary Restraining Order.

The public interest "is an important consideration in the exercise of equitable discretion in the enforcement of statutes" (*U.S. v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987)), and a court "must always consider whether the public interest would be advanced or impaired by issuance of an injunction in any action in which the public interest is affected" (*Caribbean Marine Serv. Co., Inc. v. Baldridge*, 844 F.2d 668, 677 (9th Cir. 1988)).

In this case, it is plainly in the public interest to maintain the status quo and allow bingo facilities to continue to provide revenue to charitable organizations, which, by their very nature, are designed to serve the public interest. It is also in the public interest to ensure that property rights are protected from government seizure without due process. And it is in the public interest to ensure that disabled persons have access to the same services as non-disabled persons pending resolution of the merits of plaintiffs' case.

Accordingly, every factor in the TRO calculus – the likelihood of prevailing on their claims; the balance of hardships; and the public interest – weighs in plaintiffs' favor. The Court should therefore issue the requested TRO and set this matter for a fuller briefing on plaintiffs' application for a preliminary injunction.

IV.
CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court issue a temporary restraining order and an order to show cause why a preliminary injunction should not issue to enjoin the Bureau, and all persons and/or agencies acting in concert or participation with it, from enforcing the Orders pending final resolution of the merits of plaintiffs' claims.

Dated: June 2, 2008

DLA PIPER US LLP

By _____
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